No. 15909

United States
COURT OF APPEALS
for the Ninth Circuit

W. A. RUSHLIGHT; RAYMOND G. RUSHLIGHT; W. A. RUSHLIGHT COMPANY, a partnership; W. A. RUSHLIGHT, Executor of the Estate of Betty Rushlight, deceased,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

UNITED STATES OF AMERICA,
Appellant,

v.

W. A. RUSHLIGHT; RAYMOND G. RUSHLIGHT; W. A. RUSHLIGHT COMPANY, a partnership; W. A. RUSHLIGHT, Executor of the Estate of Betty Rushlight, deceased,
Appellees.

APPELLANTS' AND CROSS-APPELLEES' BRIEF

Appeals from the United States District Court for the District of Oregon.

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CASES

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APPELLANTS' AND CROSS-APPELLEES' BRIEF

Appeals from the United States District Court for the District of Oregon.

STATEMENT OF JURISDICTION

The jurisdiction of the District Court is based upon 28 U.S.C. § 1345 and Sec. 403(c) of the Renegotiation Act (P.L. 528, 77th Cong., 2d Sess., 56 Stat. 245, as amended; 50 U.S.C.A. Appendix, § 1191; pertinent provisions of which are printed in the appendix). Appellee

brought a civil action to recover excessive profits as determined under the Renegotiation Act (R. 28).

The District Court granted a final summary judgment in favor of the appellee (R. 67-71). Appellants gave timely notice of appeal (R. 71).

This court has jurisdiction to review the judgment under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

This is a civil action under the Renegotiation Act to recover the amount of excessive profits which a partnership (W. A. Rushlight Company) received during 1942 on its sales and contracts subject to renegotiation. Appellants are three of the four partners of the partnership. The appeal is from the final order of the District Court granting the appellee's motion for a summary judgment. There is no dispute as to the principal amount of the judgment or the propriety of its entry in a summary manner if the lower court was correct in (a) striking the Second Defense of the appellants, and (b) sustaining the objections to appellants' Requests for Admissions.

The challenged action of the District Court was based upon the following allegations in the Third Amended and Supplemental Complaint (R. 28) which are admitted in the First Defense of appellants' answer thereto (R. 33-34):

Complaint

Appellants were members of a partnership engaged in construction work; under the Renegotiation Act the Secretary of War on December 18, 1945 determined that $80,000 of the profits realized by the partnership during 1942 on its contracts and sub-contracts subject to renegotiation were excessive profits; the partnership filed a petition with the Tax Court of the United States for the redetermination of the amount of its excessive profits; on September 5, 1956, the Tax Court entered its order and decision that the partnership realized excessive profits in the sum of $66,700 for the year 1942; the tax credit authorized is the sum of $10,553.98; on April 20, 1954 the sum of $7,815.03 otherwise due one of the partners was applied by appellee toward the partnership's renegotiation liability for 1942.

Based upon the foregoing admitted facts the District Court entered a summary judgment against appellants in the sum of $48,330.99, together with interest thereon at the rate of 4¼% per annum from September 5, 1956, the date of the Tax Court decision. The appellee has cross appealed on the ground interest should have been allowed from January 8, 1946, the date of demand under the original determination (R. 11).

The following is an outline of the allegations of appellants' Second Defense (R. 34-37):

Second Defense

Appellants were members of the partnership which, during the years 1942, 1943, 1944 and 1945, had contracts and sales which were subject to renegotiation under the Renegotiation Act; after 1945 the partnership had no renegotiable sales, and is in the process of liquidation; incorporated in said defense as Exhibit A (R. 37) is a summary of the profits and losses of the partnership on all of its contracts and sales subject to renegotiation, being those for the years 1942, 1943, 1944 and 1945; for said years the partnership realized profits on its renegotiable contracts and sales in the sum of $8,-686.68 without taking into account as an expense reasonable compensation for services performed by its partners; if reasonable compensation had been allowed for the partners' services there would have been no profits whatever realized by the partnership on its contracts and sales subject to renegotiation; in arriving at the amount of excessive profits realized by the partnership for 1942 neither the Secretary of War nor the Tax Court gave any consideration to the overall profits and losses of the partnership, although appellants offered to prove that their profits subject to renegotiation were as shown in Exhibit A; no relief has ever been granted to the appellants for any of the losses suffered by them for the years 1944 and 1945 on their renegotiable contracts and sales.

Supplementing the allegations in their Second De-

fense, and pursuant to Rule 31(a), Federal Rules of Civil Procedure, appellants requested appellee to admit that the following facts are true (R. 39-42):

Requests for Admissions

Exhibit A incorporated in the Second Defense is a true and correct copy of an exhibit prepared jointly by counsel for the parties in the Tax Court renegotiation proceeding; it was stipulated in the Tax Court proceeding that the exhibit is a correct summary showing the profits and losses on renegotiable sales for the partnership for the years 1942, 1943, 1944 and 1945 after the settlement of all income tax disputes between the partners and the Internal Revenue Service; in its petition to the Tax Court the partnership had alleged that its overall profits and losses should be taken into consideration in determining whether it had received excessive profits for 1942; in the Tax Court proceeding Exhibit A was offered in evidence by appellants, but the Tax Court ordered that evidence bearing on the partnership's profits and losses for years subsequent to 1942 was inadmissible; in the Tax Court proceeding no consideration was given to the profits and losses of the partnership on renegotiable business for years subsequent to 1942; the partnership and its partners have not been reimbursed for any of their losses for 1944 and 1945; in arriving at the totals shown in Exhibit A no allowance was made for salaries for the partners.

In opposition to the appellee's motion for summary judgment the appellants filed an affidavit that all of the foregoing statements in the Requests for Admissions are true (R. 60).

Appellee moved to strike appellants' Second Defense under Rule 12(f), Federal Rules of Civil Procedure (R. 43); filed objections to the appellants' Requests for Admissions under Rule 36(a) of the same rules (R. 42); and moved for a summary judgment (R. 44-57); all on the grounds that the facts alleged in the Second Defense do not constitute a defense; the District Court had no jurisdiction to consider the same; and the decision of the Tax Court was *res judicata*. The District Court granted both motions and sustained the objections.

SPECIFICATIONS OF ERROR

The District Court erred in:

1. Striking the Second Defense;
2. Sustaining the objections to the Requests for Admissions;
3. Granting the motion for summary judgment.

QUESTION PRESENTED

1. The Tax Court determined that a partnership had received excessive profits of $66,700 on its renegotiable contracts and sales for 1942.

2. Although the Tax Court did not do so, if consideration is given to all of the partnership's renegotiable

contracts and sales (being for the war years 1942 to 1945, inclusive) it did not receive *any* profits.

3. The United States brought a civil action in the District Court to recover the $66,700 excessive profits for 1942.

Does the fact that the partnership on an overall basis did not receive *any* profits constitute a defense which can be asserted in the District Court action?

SUMMARY OF ARGUMENT

This is an action to recover excessive profits received by the appellants. Such an action is governed by equitable principles and is subject to equitable defenses. It can only be maintained if the appellants in equity and good conscience are indebted to the appellee. The appellants' Second Defense shows that the appellee's action is unjust, inequitable and oppressive because defendants did not receive excessive profits—in fact, they had losses. The Second Defense is cognizable only by a court having general equitable powers. Therefore, the decision of the Tax Court is not *res judicata* and the District Court had jurisdiction to consider the Second Defense.

ARGUMENT

I. The Purpose of the Renegotiation Act.

To arrive at a correct and just decision in this case, it is necessary first to determine the purpose of the Renegotiation Act and this action brought thereunder.

In *Lichter v. United States,* 334 US 742, 68 S Ct 1294, 92 L ed 1694, the court discusses the Act in detail and outlines its history, purpose and the philosophy underlying it. The Act was sustained as a war measure designed to prevent war time profiteering. As the court said, "In total war it is necessary that a civilian make sacrifices of his property and profits with at least the fortitude that a drafted soldier makes his traditional sacrifices . . ." After describing the procedures under the Act, the court said that "Resulting injustices can and should be carefully examined and as far as possible relieved."

To summarize the holding of the court in the *Lichter* case, we think it is fair to say that the Renegotiation Act is not a revenue measure—it was passed for the purpose of preventing the profiteering which has been a traditional part of our wars. It attempts to somewhat equalize the sacrifices of the civilian population with the sacrifices of those called into the armed services. Within the procedures set by the Act the government was given a method of recovering from war contractors excessive profits which they might realize. Resulting injustices should be carefully examined and, as far as possible, relieved. The Tax Court had the exclusive jurisdiction to determine the amount of excessive profits "and such determination shall not be reviewed or redetermined by any court or agency" (Renegotiation Act). Although the District Court could consider the constitutional issue, it could not pass on any issue that could properly be brought before the Tax Court. (See *French v. War Contracts Price Adjustment Board,* 9

Cir., 1950, 182 F2d 560, where this court recognizes that, at least as to constitutional issues, they can be raised in the District Court collection suit after the Tax Court proceeding is determined—even though to do so would extend litigation. As we shall later show, the issue raised in the case at bar by appellants' Second Defense falls in the same category as a constitutional issue. *It is not such an issue as could have been passed upon by the Tax Court, an administrative tribunal with no equitable powers.*)

II. To Allow Appellee to Recover Is Unjust, Oppressive and Inequitable.

Having in mind the purpose of the Renegotiation Act, let us examine the facts before the District Court. Admittedly the partnership did receive excessive profits amounting to $66,700 in 1942. The Tax Court so determined "and such determination shall not be reviewed or redetermined by any court or agency" (Renegotiation Act). However, if the facts deemed immaterial by the District Court are considered, rather than realizing excessive profits the partnership sustained a loss on its war contracts and sales. For the four war years (including 1942) the partnership made a total profit of only $8,686.68, and this without allowing compensation for services performed by the partners. This figure should be reduced by the $7,815.03 which appellee recovered from one of the partners, leaving a balance of $871.65 total profit. The Tax Court reduced the original $80,000 determination for 1942 by $13,300 because no allowance was made for salaries for the partners (R. 55). If a

like modest allowance were made for 1943, 1944 and 1945 rather than a profit of $871.65, the partnership would have a loss of $52,328.35.

If the District Court's judgment is affirmed, in addition to the loss, the partners will have heaped upon them a judgment for $48,330.99 plus interest. Such judgment will have been obtained under a law designed not as a penalty—not as a revenue measure—but as a measure to prevent the partnership from making excessive profits on its war contracts and sales. The question in this case is simply whether or not such an oppressive, unjust and inequitable result must follow. As we shall show, it need not and should not follow, as the District Court is the proper and only forum which can grant relief from such a result.

III. The Nature of Appellee's Action and the Equitable Powers of a District Court.

Although necessarily and justifiably restricted, there is an area—narrow but nevertheless recognized—in which a court of general jurisdiction can apply the equitable principles inherent in our legal system, even in litigation between the sovereign and its citizens.

Based upon ancient precedents and principles the United States Supreme Court has recognized an area in which equitable principles will be applied even in a field as strictly statutory as that of federal taxation. The leading cases are *Bull v. United States,* 295 US 247, 55 S Ct 695, 79 L ed 1421 (applying equitable recoupment in favor of a taxpayer) and *Stone v. White,* 301 US 532,

57 S Ct 851, 81 L ed 1265, mdfd 302 US 639, 58 S Ct 260, 82 L ed 497 (applying equitable recoupment in favor of the government). In the latter case the court analyzes the basic nature of an action between the sovereign and a citizen based upon a duty to pay money imposed by law (not on contract express or implied). Such is the case at bar. The court says that such an action is "the lineal successor of the common count in *indebitatus assumpsit* for money had and received." The court then says of such an action that, "Its use to recover upon rights equitable in nature to avoid unjust enrichment by the defendant at the expense of the plaintiff, and its control in every case by equitable principles, established by Lord Mansfield in *Moses v. Macferlan,* 2 Burr 1005, 97 Eng. Reprint 676 (K.B. 1750), have long been recognized . . ." Continuing, the court says that "Since the plaintiff must recover by virtue of a right measured by equitable standards, it follows that it is open to the defendant to show any state of facts which, according to those standards, would deny the right." The court says that this case (action against government) is the converse of the *Bull* case and *United States v. MacDaniel,* 7 Pet. 1, infra, and *United States v. Ringgold,* 8 Pet. 150, infra, in which "equitable recoupment against a claim by the government was allowed notwithstanding the immunity of the government from suit."

Based upon the reasoning in the *Stone* case, appellants' Second Defense is a complete defense on either of two distinct and valid bases. In the first place, it shows that appellee's claim is inequitable, oppressive

and unjust, and should not be sustained. Independently of that, it shows that appellants did not and have not received excessive profits which in equity and good conscience should be returned to the government. Appellants did not make any profits on the war effort—in fact they sustained a loss. Furthermore, this loss grew out of the same transaction and set of facts out of which the appellee's action arose, namely, the partnership's activities as a World War II contractor with contracts and sales subject to renegotiation under the Act. Appellants are not seeking to assert a counter-claim against the government for their losses, or to recover the $7,815.03 appellee has received on account of "excessive profits." They are merely seeking to defeat appellee's claim on the equitable grounds pleaded in their Second Defense.

IV. Recoupment and the Application of Equitable Principles to Actions by the United States as Sovereign.

In *United States v. MacDaniel,* 32 US 1, 7 Pet. 1, 8 L ed 587, the United States brought an action of *assumpsit* against a clerk in the Navy Department to recover a balance due on his account. The clerk had acted as a disbursing agent and under the prevailing custom was entitled to a commission on his disbursements equal to the amount for which he was sued. The court said that even though the defendant's rights were equitable in nature he could assert them as an offset against the amount he owed the government. The court said that it could not "see any right, either legal or

equitable, in the government, to the sum of money for the recovery of which this action is brought."

United States v. Ringgold, 33 US 150, 8 Pet. 150, 8 L ed 899, involved the same principles and reasoning in an *assumpsit* action by the United States against a marshal who was entitled to certain poundage fees. The foregoing two cases are relied upon in the *Bull* and *Stone* cases, and illustrate the fact that a defendant can assert defenses, equitable in nature, to offset and defeat a claim by the government, even though the defensive matters could not be made the subject of a separate suit or counterclaim.

An old case even closer in point is *Clinkenbeard v. United States,* 88 US 65, 21 Wall. 65, 22 L ed 477. In this case the United States brought an action of debt to collect the amount of a tax based upon the gallonage capacity of a distillery. The tax had been assessed by the collector and no appeal had been taken as allowed by law. As a defense the distiller offered to prove that during a period of eight days his distillery had been shut down because of certain actions of the government, and he therefore could not have owed a capacity tax for those days. There, as in the case at bar, the government claimed that the assessment was "*res judicata* and conclusive, and defendant was precluded from showing the contrary." In allowing the defense, the court said that "to charge him with the capacity tax during those eight days was unjust and oppressive." The court said that, while the distiller could not sue without first appealing from the assesment, this was a case brought by the government and

"no statute is cited to show that he cannot, when thus sued, set up the defense that the tax was illegally assessed, although he may not have appealed to the Commissioner."

In *United States v. Pusey,* 9 Cir. 1931, 47 F2d 22, this court recognized the distinction between (a) a counterclaim for damages or a setoff of some unrelated claim, and (b) a defense in the nature of recoupment going to the merits of the government's action. In this case, the United States sued to recover estate taxes that previously had been erroneously refunded to the defendant. The defendant admitted that the refund had been erroneously made. However, defendant pleaded as a defense that the estate taxes had in the first instance been overpaid and therefore defendant was not in fact indebted to the United States. Although the defendant's affirmative pleading was denominatd a "counterclaim" it was conceded that it could not be allowed as such because no claim had ever been filed by the defendant for the overpayment. However, this court allowed the defense because the government's action was based on the proposition that the original tax was correct and the defendant could plead and prove otherwise even though he could not counterclaim.

In *American Propeller & Manufacturing Company v. United States,* 300 US 475, 57 S Ct 521, 81 L ed 751, the court had before it a case in which there was present the same element as in the case at bar, namely, because of certain statutory law, the government's position was unjust and inequitable. In this case, the plaintiff had a meritorious damage claim against the

government which did not bear interest. The government had a meritorious claim in a smaller amount which did bear interest. If the claims had been offset when they arose, the government owed the plaintiff money. If not, the plaintiff owed the government a large sum for which it was counterclaiming. At the bar of the Supreme Court, government counsel admitted that its claim was inequitable but insisted that this result followed from the statute. In this regard, the court said:

> "We have said [*United States v. The Thekla* (Luckenbach S. S. Co. v. The Thekla) 266 US 328, 339-341, 69 L Ed. 313, 315, 316, 45 S Ct 112] —'when the United States comes into court to assert a claim, it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter. The absence of legal liability in a case where, but for its sovereignty, it would be liable, does not destroy the justice of the claim against it . . . the reasons are strong for not obstructing the application of natural justice against the government by technical formulas when justice can be done without endangering any public interest'. If the principle thus stated is not strictly applicable, it at least suggests that the court should not affirm what is clearly an unjust and inequitable result unless under plain compulsion of law."

There are several recent cases (not admiralty cases) in which the courts of appeal have held that when the United States asserts a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter. In this connection see *Jacobs v. United States,* 4 Cir., 1956, 239 F2d 459; *Lacey v. United States,* 5 Cir., 1954,

216 F2d 223; *In re Greenstreet, Inc.,* 7 Cir., 1954, 209 F2d 660.

In the latter case, after carefully reviewing the authorities, the court summarized them by saying:

> "The postulate to be distilled from the cases is, as we have observed, that the United States, by initiating an action as plaintiff, consents to the jurisdiction of the court to entertain any defensive plea including the right of setoff to the extent of the government's claim, but does not thereby consent to an affirmative judgment on a counterclaim. Stated differently, this consent empowers the court to decide all issues necessary to dispose of the general claim initiated by the government, but does not, as in the case of private litigants under the Federal Rules, extend to power to decide separate affirmative claims which the defendant may have by way of counterclaim."

For a case in this court holding that by bringing an action the United States does not consent to the filing of affirmative counterclaims against it, see *United States v. Finn,* 9 Cir., 1956, 239 F2d 679.

In an article, "Government Immunity From Counterclaims," 50 Columbia Law Review 505, 509, the author states:

> "The reason for permitting recoupment against the United States is not that the Government, by instituting suit, submits the entire transaction upon which its claim is based to the jurisdiction of the court. Rather, recoupment is said to be essentially defensive, and, concededly, sovereign immunity is not elastic enough to bar defenses going to the merits of the Government's claim."

See also 3 *Moore's Federal Practice,* Sec. 1302, Note 1, where the author says that the "matter of recoupment

may, without statutory authority, be asserted against the sovereign by counterclaim to defeat recovery, but setoff and other independent claims may not be, unless there is statutory authority therefor."

Thus, we have shown that in the extremely rare but proper case, the courts have always recognized that a defendant, when sued by the United States, may show equitable matters. Such matters may relate to the equity or enforceability of the government's claim. Or, such matters may show that the defendant is not indebted to the United States because of some facet or aspect of the transaction on which the United States is suing. In the case at bar, the United States is suing for excessive profits when there were in fact no profits as is shown by the Second Defense.

V. The Tax Court Had No Jurisdiction to Consider the Facts Alleged in the Second Defense.

In its order striking the appellants' Second Defense and sustaining the objections to appellants' Requests for Admissions, the District Court recited that the matters raised therein "are matters of law which were fully determined by the Tax Court's determination and that this court does not have jurisdiction of the matters so raised." (R. 66).

It must be conceded that the Tax Court did not have these matters before it, as both the Second Defense and the Requests for Admissions state that the Tax Court ruled that evidence bearing on profits for years subsequent to 1942 was inadmissible and that the Tax Court

gave no consideration to the profits and losses of the partnership for years subsequent to 1942.

Of course, if the Tax Court *could* have considered these facts, then the matter would be *res judicata,* since that doctrine would apply not only to issues that were litigated before the Tax Court but also to issues which could have been litigated.

However, the Tax Court was clearly correct in holding that the matters in the Second Defense could not be considered by that "court." The Renegotiation Act itself makes this clear in that it specifically provides in Sec. 403(a)(4)(C) that "notwithstanding any of the provisions of this section to the contrary, no amount shall be allowed as an item of cost . . . (ii) by reason of the application of a carryover or carryback under any circumstances."

It is also clear that the Tax Court had no right to consider an equitable defense or matters in the nature of recoupments, since the Tax Court is not really a court at all, but an administrative agency having no equitable powers. This is made clear in the case of *Commissioner v. Gooch Milling & Elevator Co.,* 320 US 418, 64 S Ct 184, 88 L Ed 139. In this case the taxpayer sought to have the Board of Tax Appeals (now Tax Court) apply the doctrine of equitable recoupment by eliminating a 1936 deficiency because of an overpayment of 1935 taxes. In upholding the Board's refusal to consider this matter, the Supreme Court stated at pages 419-422:

"We hold that the Board's position was correct

and that it had no jurisdiction to . . . apply any overpayment of the taxes for the 1935 fiscal year against the 1936 deficiency.

"The . . . legislative pattern of . . . [the Board's] jurisdiction is clear and unambiguous. The Board is confined to a determination of the amount of deficiency or overpayment for the particular tax year as to which the Commissioner determines a deficiency and as to which the taxpayer seeks a review of the deficiency assessment. . . .

"The Board's want of jurisdiction to apply the doctrine of equitable recoupment in this case is manifest. . . .

"*We are not called upon to determine the scope of equitable recoupment when it is asserted in a suit for refund of taxes in tribunals possessing general equity jurisdiction.* Cf. *Bull v. United States,* 295 US 247; *Stone v. White,* 301 US 532. But its use in proceedings before the Board is governed by the circumscribed jurisdiction of that agency. The Internal Revenue Code, not general equitable principles, is the mainspring of the Board's jurisdiction. Until Congress deems it advisable to allow the Board to determine the overpayment or underpayment in any taxable year other than the one for which a deficiency has been assessed, the Board must remain impotent when the plea of equitable recoupment is based upon an overpayment or underpayment in such other year." (Emphasis supplied)

This court had occasion recently to examine the powers of the Tax Court in the case of *Lasky v. Commissioner of Internal Revenue,* 9 Cir. 1956, 235 F2d 97, in which the question arose as to whether or not the Tax Court had the power to vacate one of its decisions, a power that would rest in a District Court. In discussing the powers of the Tax Court, this court

said of that body that "Though not a court at all but merely an administrative agency it assumed the power of a district court . . ." and vacated its own decision. It is interesting to note that the contention was made that the Tax Court is "like other courts" and has the "inherent power to control, amend, open and vacate its decisions." This contention was summarily rejected. The United States Supreme Court affirmed this court in a *per curiam* opinion (See *Lasky v. Commissioner,* 352 US 1037, 77 S Ct 594, 1 L Ed 2d 598).

Thus it can be seen that the one and only forum that could hear the equitable defense pleaded by the appellants is the District Court, and the Tax Court was absolutely correct when it refused to consider the matters raised in the Second Defense. As previously stated, this court recognized in the case of *French v. War Contracts Price Adjustment Board,* supra, that there are issues which can be raised in the District Court renegotiation collection suit which could not properly be brought before the Tax Court. In that case the issue mentioned was a constitutional issue. By the same reasoning, this also would be true as to an equitable defense which could not be raised in the Tax Court since that body is clearly but an administrative agency without the equitable powers of the District Court.

CONCLUSION

Appellants' Second Defense and the related Requests for Admissions show that appellant have an equitable defense to this action. The District Court erred in its rulings concerning the same and in entering a summary judgment against appellants. This case should be reversed and remanded to the District Court for trial on the merits.

Respectfully submitted,

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Cross Appellees.

APPENDIX

Section 403(c) of the Renegotiation Act (P.L. 528, 77th Congress, 2d Sess., 56 Stat. 245), provided, in part, as follows:

"Sec. 403 (c). (1) Whenever, in the opinion of the Secretary of a Department, the profits realized or likely to be realized from any contract with such Department, or from any subcontract thereunder whether or not made by the contractor, may be excessive, the Secretary is authorized and directed to require the contractor or subcontractor to renegotiate the contract price. When the contractor or subcontractor holds two or more contracts or subcontracts the Secretary in his discretion, may renegotiate to eliminate excessive profits on some or all of such contracts and subcontracts as a group without separately renegotiating the contract price of each contract or subcontract.

"(2) Upon renegotiation, the Secretary is authorized and directed to eliminate any excessive profits under such contract or subcontract

"(i) by reductions in the contract price of the contract or subcontract or by other revision in its terms; or

"(ii) by withholding, from amounts otherwise due to the contractor or subcontractor, any amount of such excessive profits; or

"(iii) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to the subcontractor, any amount of such excessive profits under the subcontract; or

"(iv) by recovery from the contractor or subcontractor, through repayment, credit or suit, of any amount of such excessive profits actually paid to him; or

"(v) by any combination of these methods, as the Secretary deems desirable. *The Secretary may bring actions on behalf of the United States in the appropriate courts of the United States to recover from such contractor or subcontractor, any amount of such excessive profits actually paid to him and not withheld or eliminated by some other method under this subsection.* The surety under a contract or subcontract shall not be liable for the repayment of any excessive profits thereon. All money recovered by way of repayment or suit under this subsection shall be covered into the Treasury as miscellaneous receipts.

"(3) In determining the excessiveness of profits realized or likely to be realized from any contract or subcontract, the Secretary shall recognize the properly applicable exclusions and deductions of the character which the contractor or subcontractor is allowed under Chapter 1 and Chapter 2 E of the Internal Revenue Code. In determining the amount of any excessive profits to be eliminated hereunder the Secretary shall allow the contractor or subcontractor credit for Federal income and excess profits taxes as provided in Section 3806 of the Internal Revenue Code." (Emphasis supplied)

[Note: The above section was a part of the original Renegotiation Act of 1942. By Section 701 (b) of the Revenue Act of 1943 (P.L. 235, 78th Congress, 58 Stat. 78) the foregoing section was amended and appears in 50 U.S.C.A. Appendix Section 1191, in its amended form. The Amendment was effective for fiscal years ending subsequent to June 30, 1943. The appellee's action was brought under the above section.]

Section 403 (a)(4)(C) of the Renegotiation Act states, in part:

"Notwithstanding any of the provisions of this

section to the contrary, no amount shall be allowed as an item of cost * * * (ii) by reason of the application of a carry-over or carry-back under any circumstances."

[Note: The above was one of the retroactive amendments made by Section 701 (b) of the Revenue Act of 1943 (Renegotiation Act).]

Section 403 (e) of the Renegotiation Act provides:

"Sec. 403 (e). (1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under section (c) (1), file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order ,to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. For the purposes of this subsection the court shall have the same powers and duties, insofar as applicable, in respect of the contractor, the subcontractor, the Board and the Secretary, and in respect of the attendance of witnesses and the production of papers, notice of hearings, hearings before divisions, review by the Tax Court of decisions of divisions, stenographic reporting, and reports of proceedings, as such court has under sec-

tions 1110, 1111, 1113, 1114, 1115 (a), 1116, 1117 (a), 1118, 1120, 1121 of the Internal Revenue Code in the case of a proceeding to redetermine a deficiency. * * *

"(2) Any contractor or subcontractor (excluding a subcontractor described in subsection (a) (5) (B)) aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with The Tax Court of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of such determination, file a petition with The Tax Court of the United States for redetermination thereof. Upon such filing such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1), except that the amendments made to this section by Revenue Act of 1943 which are not made applicable as of April 28, 1942, or to fiscal years ending before July 1, 1943, shall not apply."